

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA	)	CRIMINAL ACTION NO. 3:03CR00015
	)	
v.	)	<u>MEMORANDUM OPINION</u>
	)	
JAMES WILLIAM WASHINGTON,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the defendant's January 14, 2004 motion to suppress evidence seized and statements taken pursuant to the execution of a search warrant at the defendant's residence, and the defendant's related request for a hearing to determine the sufficiency of the evidence provided to the magistrate in the warrant application. The court heard argument on the defendant's motion on February 5, 2004.

For the reasons set forth below, the court finds that the search warrant was validly issued. Accordingly, the court will deny the defendant's motion to suppress and request for a hearing.

**I. Facts**

On December 12, 2000, Detective Wendy Lewis of the Charlottesville Police Department was called to respond to a complaint made by Nykeia Washington. Ms. Washington, who was in the hospital with minor injuries, told Detective Lewis that she had been assaulted earlier in the evening by two other women, whom she identified as Kelly Gonzalez and Georgette Shelton. According to Lewis, Nykeia Washington indicated that the altercation began outside a local convenience store. Ms. Washington explained that she was

then told to meet Gonzalez at a particular address—1039 Fifth Street in Charlottesville—to finish the fight. Nykeia Washington did so, bringing along several of her friends, and, according to her statement, the dispute later continued in the parking area at the specified address.

Nykeia Washington reported to Detective Lewis that the defendant, James William Washington, was present during the second confrontation with Gonzalez. Although it is not clear how the defendant came to be involved in the dispute, later investigation by Detective Lewis revealed that the address given by Ms. Gonzalez was the defendant's residence. According to Ms. Washington, she and Gonzalez physically fought in the parking area. Ms. Washington indicated that sometime during the fight, the defendant took a small handgun from a black car parked in the driveway and pointed it at Nykeia and her friends. Nykeia told Detective Lewis that the defendant threatened to kill Nykiea and her friends and then shot the gun in their direction several times. In response, Nykeia fled the area and later filed the complaint that formed the basis of Detective Lewis's investigation.

Detective Lewis sought to interview additional witnesses who may have been present during the argument that evening. Lewis spoke with one other witness who stated that she was in a nearby vehicle at the time and heard shots fired. The witness apparently did not observe the events in question personally, nor could she provide any additional information concerning Nykeia Washington or her friends. Detective Lewis was unable to locate additional witnesses.

During the course of her investigation, Detective Lewis discovered that the defendant, identified by Ms. Washington as James Washington, had previously been convicted of a felony

offense. Accordingly, and based primarily on the information provided by Nykeia Washington, Lewis sought a warrant to search the defendant's residence and vehicle for the small black handgun allegedly wielded by the defendant during the fight. Detective Lewis contacted Nykeia Washington and asked that she appear before a magistrate to testify in support of Detective Lewis's application for a search warrant. Ms. Washington, however, failed to appear and ultimately could not be located. Nonetheless, Detective Lewis was eventually able to obtain a warrant based on the information uncovered during her investigation.

## **II. Discussion**

The defendant now asks this court to suppress the evidence seized and any statements obtained pursuant to the execution of the search warrant issued in his case. The defendant challenges the validity of the warrant on two grounds. First, the defendant argues that Detective Lewis failed to disclose clearly the basis of the information provided in the warrant application and that this error amounts to a material misrepresentation entitling the defendant to a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). Second, the defendant contends that, even absent any misrepresentation made by Detective Lewis, the information provided in the warrant application is insufficient to support a finding of probable cause.

The government opposes the defendant's motion and argues that the affidavit presented by Detective Lewis did not include a materially false statement or representation sufficient to call the validity of the warrant into question. The government also contests the defendant's assertion that the warrant was not supported by probable cause. The court will address each of the defendant's contentions in turn below.

### ***A. Franks Hearing***

The court turns first to the defendant's request for a hearing to test the veracity of the source of material information provided to the magistrate judge in the warrant application. In *Franks v. Delaware*, 438 U.S. 152 (1978), the Supreme Court held that, in some circumstances, a hearing must be granted in order to determine the validity of statements made in an affidavit in support of a search warrant. According to the Court, the protections afforded citizens by the Fourth Amendment's Warrant Clause are implicitly grounded in the assumption that a showing of probable cause must be presented in good faith and in the belief that factual assertions are truthful. *Id.* at 165. Consequently, a defendant may be entitled to a hearing to determine the truthfulness of an affidavit in support of a warrant application.

In reaching its conclusion, the Court noted that the rule it announced should have a "limited scope." *Id.* at 167. Accordingly, a defendant seeking the protections of this doctrine must overcome two rather high hurdles. First, an evidentiary hearing is required only when a defendant makes a substantial preliminary showing of the existence of a "material falsehood or of reckless disregard for the truth." *Id.* at 171. Such allegations must be accompanied by an offer of proof and should identify specifically those portions of the affidavit that are claimed to be false. *Id.* Second, even if a defendant sufficiently alleges a material falsehood, a hearing will not be required unless, "when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause." *Id.* at 171-72.

The Court of Appeals for the Fourth Circuit has extended the scope of *Franks* to reach both affirmative misrepresentation as well as material omissions. *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990). For cases of both misrepresentation and omission, the Fourth Circuit has made it clear that the *Franks* rule requires something more than mere negligence or knowledge of a particular fact. Rather, the court of appeals has held that ‘*Franks* protects against omissions [or misstatements] that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*, the magistrate.’ *Id.* at 301. In other words, a defendant will not be entitled to a hearing if he can produce no evidence from which a court could rationally infer a bad motive on the part of the officer responsible for the omission or misstatement. *See id.*; *see also Simmons v. Poe*, 47 F.3d 1370, 1384 (4th Cir. 1995) (holding that the defendant did not make a sufficient showing of flagrant police misconduct to justify a *Franks* hearing when he failed to produce any evidence suggesting that the officer omitted certain information with the object to mislead or misrepresent).

In this case, the challenged factual misstatement is Detective Lewis’s failure to state clearly the basis for her knowledge of the facts presented to the magistrate in her warrant application. The defendant contends that because Lewis checked a box on the warrant application form indicating that she had personal knowledge of the facts set forth in the affidavit, the magistrate was thereby materially misled concerning the basis of the information presented in the affidavit. The defendant argues that because Lewis’s information came almost entirely from the statements provided by Nykeia Washington, Lewis should have checked the other box on the form indicating that the source of her information was an “informer” and

should have provided sufficient facts for the magistrate to make an independent determination of the reliability or credibility of the information presented in the affidavit.

The government contends that by checking the “personal knowledge” box on the affidavit form Detective Lewis merely indicated to the magistrate that the information presented was not derived from a confidential informant. Instead, the government asserts, a magistrate within the City of Charlottesville would have been familiar with the form employed by the city’s police officers and would have understood that the officer did not intend to convey the notion that the facts were derived from her direct knowledge.

In the court’s view, Detective Lewis’s decision to mark one or the other check box on a warrant application form does not control the validity of the warrant. Rather, the court’s inquiry must focus on whether the officer’s decision to check the personal knowledge box was either designed to mislead the magistrate or was taken in reckless disregard of its misleading effect. Although the court could envision some circumstances in which an affiant’s decision to check the personal knowledge box might be suspect, there is no such indication in this case. Although Detective Lewis’s failed to communicate explicitly the manner in which she obtained her information, there is no indication that this failure in any way misled the magistrate to believe that the officer had direct personal knowledge of the events of December 12, 2000.

In fact, the source of Detective Lewis’s information is suggested within the text of the affidavit itself. The affidavit describes the altercation between Nykeia and Ms. Gonzalez without reference to an information source, but continues with the following language: “Ms.

*Washington stated* that James Washington went to a small black vehicle parked in the driveway and came back with a small black gun. *She states* that he pointed the gun at her and her friends and stated that he was going to kill [them].” (Aff. of Det. Lewis.) (emphasis added). This language clearly indicates to the reader that Ms. Washington was the source of information concerning the event in question.<sup>1</sup> Detective Lewis’s failure to make the source of the facts recited in the affidavit patently obvious does not rise to the level of reckless disregard for the truth. At most, her error was negligent, and mere negligence does not suffice to require a *Franks* hearing.

Because the defendant has not made a sufficient preliminary showing of material falsehood or omission, the court need not determine whether Detective Lewis’s failure to provide the magistrate with specific information concerning the source of her information and the credibility of the complaining witness was material to the magistrate’s probable cause determination. Accordingly, the court will deny the defendant’s motion for a hearing to determine the sufficiency of the evidence provided to the magistrate in the warrant application.

### ***B. Probable Cause Determination***

In the alternative, the defendant claims that the search warrant was invalid because it was lacking in probable cause. The defendant attacks the sufficiency of the magistrate’s probable

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<sup>1</sup> Although the affidavit is based on evidence that would be classified as hearsay, reliance on hearsay evidence is acceptable in the context of a warrant application. FED. R. CRIM. P. 41(c)(1); *United States v. Ventresca*, 380 U.S. 684 (1965).

cause determination on two grounds. First, the defendant challenges the timing of the search warrant petition, arguing that the passage of time rendered the information stale. Second, the defendant questions the reasonableness of the assumption—implicit in the probable cause determination—that the handgun allegedly taken out a vehicle would be found in the defendant’s residence.

### ***1. Staleness***

A search warrant is valid only upon a showing of “facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.” *Sgro v. United States*, 287 U.S. 206, 210-11 (1932). Thus, “evidence seized pursuant to a warrant supported by ‘stale’ probable cause is not admissible in a criminal trial to establish the defendant’s guilt.” *United States v. McCall*, 740 F.2d 1331, 1335 (4th Cir. 1984). Staleness can arise when the information upon which a warrant is issued was arguably too old to furnish present probable cause. *Id.* The task for a court evaluating whether or not the warrant was validly issued is to examine all of the relevant facts and circumstances, including “the nature of the unlawful activity alleged, the length of the activity, and the nature of the property to be seized.” *Id.*

The Fourth Circuit has recognized that, upon consideration of these three factors, probable cause may exist despite a substantial gap in time between the observation of evidence at a particular place and the issuance of a search warrant. *Id.* Thus, for example, the information upon which a warrant is based is not stale when “the criminal activity alleged in the



warrant is [ ]ongoing in nature, [or] the evidence sought [is] intrinsically likely to remain at the location where it was originally observed.” *Id.*

In this case, the balance of the factors the court must consider weighs against a determination of staleness. While the nature of the criminal activity alleged in seeking the warrant was not of an ongoing or longstanding variety, the evidence sought to be seized (the handgun) was likely to remain located within the defendant’s possession and in the same general location. Furthermore, the relatively insignificant delay of just over a month in obtaining a warrant and the officer’s decision to delay her application for a warrant in order to conduct additional investigation and to attempt to secure the appearance of a witness both weigh against a finding of staleness. Accordingly, the court rejects the defendant’s contention that the information contained in Detective Lewis’s affidavit was stale.

## **2. Nexus**

The defendant also contests the magistrate’s determination of the existence of probable cause to issue a warrant as unreasonable. In reviewing the magistrate’s determination concerning probable cause, this court’s task is not to review the magistrate’s findings de novo, but rather to determine whether there is substantial evidence in the record supporting the judicial officer’s decision to issue a warrant. *Massachusetts v. Upton*, 466 U.S. 727 (1984); *United States v. Leon*, 468 U.S. 897, 926 (1984); *Illinois v. Gates*, 462 U.S. 213, 231-38 (1983).<sup>2</sup>

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<sup>2</sup> The defendant argues that under the circumstances of this case, the good faith

To evaluate whether a warrant is supported by probable cause, a court must examine whether it is reasonable to believe that the items to be seized will be found in the place to be searched. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978). Because the test is at bottom one of reasonableness, probable cause can be inferred from the circumstances. “ [A] warrant is not invalid for failure to produce direct evidence that the items to be seized will be found at a particular location.” *United States v. Lalor*, 996 F.2d 1578, 1582 (4th Cir. 1993). Rather, “the nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence.” *United States v. Anderson*, 851 F.2d 727, 729 (4th Cir. 1988). The required nexus may be demonstrated producing evidence of geographic proximity between the location of known illegal activity or contraband and the place to be searched. *See Lalor*, 996 F.2d at 1583.

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exception of *United States v. Leon* does not apply. Specifically, he contends that because the magistrate was misled by information in the affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth, *Leon*, 468 U.S. at 923, this case falls within one of the four recognized exceptions to *Leon*. In this case, however, the court has determined that Detective Lewis did not mislead the magistrate, and, consequently, the defendant’s argument concerning the good faith exception to the warrant requirement must fail.

In this case, the affidavit does provide substantial evidence to support the magistrate's probable cause determination. Although the evidence from the affidavit does not specifically link the defendant's possession of a weapon with his home, there is a substantial nexus between the defendant's car, located in his driveway, and his house. The magistrate could reasonably infer that a handgun seen not far from the defendant's residence might typically be kept within the residence. The court accordingly concludes that the magistrate's determination was made in good faith and that the search warrant is therefore constitutionally valid.

### III.

For the foregoing reasons, the court finds that there was neither a material misrepresentation nor a reckless disregard for the truth in the officer's affidavit and therefore no *Franks* hearing is justified. The court further finds that the magistrate's determination of probable cause should not be disturbed. Accordingly, the defendant's motion to suppress shall be denied. An appropriate order shall this day enter.

The Clerk of the Court hereby is directed to send a certified copy of this memorandum opinion to all counsel of record and to the defendant.

ENTERED: \_\_\_\_\_  
Senior United States District Judge

\_\_\_\_\_  
Date

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UNITED STATES OF AMERICA	)	CRIMINAL ACTION NO. 3:03CR00015
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v.	)	<u>ORDER</u>
	)	
JAMES WILLIAM WASHINGTON,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the defendant's Motion to Suppress and Request for *Franks* Hearing, filed January 14, 2004. For the reasons set forth in the accompanying memorandum opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The defendant's Motion to Suppress and Request for *Franks* Hearing, filed January 14, 2004, shall be, and it hereby is, DENIED.

2. The Clerk of the Court shall be, and hereby is, directed to set this matter for trial.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying memorandum opinion to all counsel of record.

ENTERED: \_\_\_\_\_

Senior United States District Judge

\_\_\_\_\_  
Date